



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 632 OF 2017**

**NELLY KALIA KILONZO.....1<sup>ST</sup> APPELLANT**

**HARRIZON MATIVO.....2<sup>ND</sup> APPELLANT**

**CECILIA NDUNG'E.....3<sup>RD</sup> APPELLANT**

**FELIX MAUTA.....4<sup>TH</sup> APPELLANT**

**-VERSUS-**

**CIC GENERAL INSURANCE LIMITED.....1<sup>ST</sup> RESPONDENT**

**EQUITY INSURANCE AGENCY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> respondent filed the application dated 20<sup>th</sup> March, 2017 before the trial court, seeking to have its name struck out of the suit on grounds that it was non-suited. Upon hearing the parties, the trial court allowed the application vide its ruling delivered on 17<sup>th</sup> October, 2017 and also awarded costs of the application to the 2<sup>nd</sup> respondent.

2. The above ruling precipitated the appeal which was filed by the appellants before the High Court, seeking to have the ruling set aside. The High Court, upon hearing the appeal, allowed it by setting aside the ruling of the trial court and substituting it with an order dismissing the 2<sup>nd</sup> respondent's application of 20<sup>th</sup> March, 2017, by way of its judgment delivered on 20<sup>th</sup> January, 2020. The High Court also awarded costs of the appeal to the appellants. Thereafter, the appellants filed the party and party Bill of Costs dated 7<sup>th</sup> February, 2020 against the 2<sup>nd</sup> respondent. When the Bill of Costs came up for hearing before the taxing master, the advocate for the 2<sup>nd</sup> respondent contended that the Bill of Costs ought to be taxed as against both respondents, which prompted the matter being placed before this court.

3. Following the directions of this court, the parties filed and exchanged written submissions on the issue of costs.

4. I have considered the rival submissions on record plus the authorities cited. It is clear that the sole issue for determination has to do with who should bear the costs of the appeal between the two (2) respondents.

5. On their part, the appellants urge this court to order that the costs of the appeal be borne by the 2<sup>nd</sup> respondent since the 1<sup>st</sup> respondent did not participate in the hearing of the appeal and the orders sought and made on appeal have no adverse impact on the latter. The appellants have cited inter alia, the case of **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014** where the court held thus:

*“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”*

6. The 1<sup>st</sup> respondent submits that since it did not participate in the appeal which was essentially between the appellants and the 2<sup>nd</sup> respondent, the latter cannot now purport to have the costs of the appeal borne by itself and the 1<sup>st</sup> respondent. Reference was made *inter alia*, to the judicial authority of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** in which the court reasoned that in determining the issue of costs, the following factors are to be considered:

*“the conduct of the parties; the subject of litigation; the circumstances which led to the institution of the proceedings; the events which eventually led to their termination; the stage at which the proceedings were terminated; the manner in which they were terminated; the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.”*

7. In response, the 2<sup>nd</sup> respondent argues that since the 1<sup>st</sup> respondent was equally sued in the appeal and in fact participated therein, both respondents ought to bear the costs of the said appeal. The 2<sup>nd</sup> respondent further argues that to order it to solely bear the costs of the appeal will result in financial suffering and injustice.

8. Upon perusal of the record, I established that the application dated 20<sup>th</sup> March, 2017 which gave rise to the ruling delivered on 17<sup>th</sup> October, 2017 and consequently, the appeal with the High Court, was essentially between the appellants and the 2<sup>nd</sup> respondent, with the latter claiming that it had been improperly joined as a party to the suit. The record also shows that whereas the advocate for the 1<sup>st</sup> respondent attended court for the hearing of both the application and the appeal, the 1<sup>st</sup> respondent did not file any documents or play any active role in both instances. From the judgment on appeal, I note that the issue of who ought to bear the costs of the appeal was not addressed.

9. In that case, **Section 27(1) of the Civil Procedure Act Cap. 21 Laws of Kenya** which was cited by the parties herein provides that the issue on costs of all suits (and appeals) lies with the discretion of the courts and that such costs shall follow the event. It is therefore clear that it is upon the courts to determine who ought to bear the costs incidental to suits, applications and appeals. This legal position was reaffirmed by the court in the case of **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014** as seen hereinabove and which case was similarly referred to by the parties.

10. Upon considering the foregoing circumstances, I am not convinced by the argument of the 2<sup>nd</sup> respondent that the costs ought to be borne by both respondents; I am inclined to agree with the positions taken by the appellants and the 1<sup>st</sup> respondent.

11. I am therefore of the view that it would be in the interest of justice and a proper exercise my discretion to order and direct that the costs of the appeal in this instance be hereby borne solely by the 2<sup>nd</sup> respondent. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.**

**J. K. SERGON**

**JUDGE**

In the presence of:

Mr. Ray Aboge . for the Appellant

No appearance for the 1<sup>st</sup> respondent

No appearance for the 2<sup>nd</sup> respondent



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